LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 6 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 707

E. TOTONELLY SONS, INC., *Petitioner*,

v.

TOWN OF FAIRFIELD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner.

February 6, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Rule involved	2
Statement	3
Reasons for granting the writ	11
1. The action of the Court of Appeals raises an important and unresolved problem in the calculation of the time for petitioning for certiorari	11
2. The refusal of the Court of Appeals to discuss the important issues as to the application of Connecticut law to this diversity case raises an important and unresolved problem in judicial administration	14
Conclusion	16
Appendix:	
Orders of the Court of Appeals	1a
Opinion of the Court of Appeals	5a
Opinion of the District Court	10a

CITATIONS

Cases:

Boxman v. Loperena, 311 U.S. 262	12
Chatfield Co. v. O'Neill, 89 Conn. 172	5
Clover Mfg. Co. v. Austin Co., 101 Conn. 208	5
Conboy v. First National Bank, 203 U.S. 141	13
Dahl v. Edwin Moss & Son, Inc., 136 Conn. 147	5, 15
Drake Bakeries, Inc. v. Bakery Workers Local 50, No. 598, Oct. Term, 1961	14
Erie R. Co. v. Tompkins, 304 U.S. 64	14
Friend v. Green, 146 Conn. 360	5, 15
O'Loughlin v. Poli, 82 Conn. 427	5
Pinches v. Swedish Lutheran Church, 55 Conn. 183	7

	Page
Tompkins, Inc. v. Bridgeport, 94 Conn. 659	9
Tompkins, Inc. v. Bridgeport, 100 Conn. 147	7
Town of Milford v. O'Neil Bros., Inc., 8 Conn. Sup. 403	6, 7
United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499	16
Valenti v. Weinberg, 80 Conn. 134	9
Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131	13
MISCELLANEOUS:	
28 U.S.C. § 452	13
28 U.S.C. § 2101(c)	11
Rule 52(a), Fed. Rules Civ. Proc.	10, 15
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland ed., 1951)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

E. TOTONELLY SONS, INC., *Petitioner*,

v.

TOWN OF FAIRFIELD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, E. Totonelly Sons, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on June 30, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 292 F. 2d 463. The opinion of the United States District Court for the District of Connecticut is unreported. Both opinions are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the court below was entered on June 30, 1961. A motion for leave to file a petition for rehearing *en banc* out of time was denied on October 23, 1961, by the original three-judge panel that decided the case. But on November 9, 1961, all the active judges of the Circuit (save Chief Judge Lumbard) denied the petition for rehearing *en banc* "upon consideration thereof." This petition for a writ of certiorari is filed within 90 days following the denial of that petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the 90-day period within which to file a petition for certiorari may be computed from the date when the active judges of the Court of Appeals have considered and denied a petition for rehearing *en banc*, the original three-judge panel having previously denied a motion for leave to file such a petition out of time.

2. Whether the Court of Appeals, in refusing to discuss important issues as to the application of state law by a District Court in a diversity suit, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

RULE INVOLVED

Rule 19 of this Court's Revised Rules:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) . . .

(b) Where a court of appeals has . . . decided an important state or territorial question in a way in conflict with applicable state of territorial law . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT

Petitioner entered into a contract in 1951 to construct certain lateral sewers for the respondent Town of Fairfield, Connecticut. This suit was brought by the petitioner in the United States District Court for the District of Connecticut, on grounds of diversity of citizenship, to recover (1) unpaid contract balances, (2) claims for additional work, and (3) damages for breach of contract. The Town filed a counterclaim for damages resulting from allegedly defective work by petitioner.

The trial before the District Court, sitting without a jury, extended over 83 trial days. After entering 66 detailed findings of fact, the District Court concluded that the petitioner had not fulfilled its obligations under the contract and that its faulty workmanship had caused excessive infiltration of water beyond the allowable limits specified in the contract. The court accordingly dismissed petitioner's complaint and awarded damages to the Town on its counterclaim.

Petitioner attacked many of the findings of fact, as well as the conclusions of law, in its appeal to the Court of Appeals for the Second Circuit. But its main argument before both the District Court and the Court of Appeals was that the concededly applicable law of Connecticut necessitated recognition of petitioner's claims as a matter of law and likewise precluded any recovery on the counterclaim. More specifically, petitioner urged as follows:

(1) *Connecticut law obligated the District Court to award petitioner the balance of the contract price since the Town's engineers had found petitioner's work acceptable and in accordance with the contract.* The petitioner had finished substantially all of the work specified in the original contract by the end of 1951. The Town's engineers had supervised this work and had found, *inter alia*, that the infiltration was within the allowable limits. The engineers accordingly issued nine approximate certificates for this work, certifying "the value of the work performed and materials furnished in accordance with the contract" (See. G31 of contract). Payments amounting to 100% of the contract price, less the 10% retainage provided for by the contract, were made to petitioner on the basis of these nine certificates. In January, 1952, the Town issued an additional order to petitioner for the construction of additional sewers, aggregating approximately $25,000; this work was finished by June of 1952 and was found "unqualifiedly acceptable."

But in the summer of 1952, the Town's engineers repudiated their 1951 determinations as to the acceptability of petitioner's workmanship under the original contract and their approvals thereof as the work had progressed. Solely because of excessive

infiltration in 1952, the engineers concluded that the 1951 workmanship was "poor." They accordingly recommended that the Town not pay the last three certificates aggregating in amount the $25,000 earned under the extra order.

Connecticut law is clear, however, that the 1951 determinations of the engineers "were final and binding upon the parties, unless they resulted from fraud or bad faith." *Friend* v. *Green*, 146 Conn. 360, 365; see also *Chatfield Co.* v. *O'Neill*, 89 Conn. 172, 173. That being so, it was not within the scope of the District Court's function, in applying Connecticut law, to inquire into petitioner's workmanship under the original contract or to substitute its judgment for that rendered by the engineers in 1951. As said in *Friend* v. *Green*, *supra*, 365, "It was not within the authority of the court to substitute its decision for that of the [engineers]" and "under the circumstances the certificates issued by the [engineers] entitled the contractors to payments of the sums certified by the [engineers], to be properly due." This is the law of Connecticut even if the approval of the workmanship by the engineers, as the work progressed, was unwarranted and even if the District Court's opinion that petitioner's workmanship was "poor" was justified by the facts. *Dahl* v. *Edwin Moss & Son, Inc.*, 136 Conn. 147, 153-4. To the same effect, see *Clover Mfg. Co.* v. *Austin Co.*, 101 Conn. 208, 213; *O'Loughlin* v. *Poli*, 82 Conn. 427.

By virtue of the foregoing law of Connecticut, petitioner was entitled to recover the unpaid retainage due on the original contract, as well as the $25,000 owing for the work on the additional sewers.

(2) *Connecticut law precluded the District Court from finding that excessive infiltration constituted a*

breach of contract by the petitioner. The core of the District Court's decision was its finding that, despite the favorable 1951 determinations of the engineers, the excessive infiltration noticed in 1952 was due to "a great deal of bad workmanship" by petitioner during 1951. But as the District Court itself found (Finding 42), by the end of July 1952, when the instant litigation was begun, the Town "did not know specifically what the defects were which caused the infiltration." And there was no evidence that the infiltration was in any way due to a failure to follow the contract drawings and specifications or the directions of the engineers.

In these circumstances, it is "a matter of law" in Connecticut that "the existence of excessive infiltration does not constitute a breach of the contractor's undertaking and that liability can be imposed upon it only if it be established that the materials furnished or the method of doing the work did not meet the requirements of the drawings and specifications or in some material way departed from the proper orders of the engineer having supervision and direction or, satisfying the demands of the plans and specifications, yet was not performed in a workmanlike manner." *Town of Milford* v. *O'Neil Bros., Inc.*, 8 Conn. Sup. 403, 415.

In other words, excessive infiltration as such is no indication of a breach of contract under Connecticut law. And since Connecticut law precluded the District Court from reexamining the 1951 determinations of the engineers, the court could not properly conclude that the excessive infiltration was the result of poor workmanship in 1951. Connecticut law, in short, pre-

cluded a finding that the petitioner had breached the original contract or failed to fulfill its obligations.

(3) *Connecticut law obligated the District Court to recognize the breach of contract committed by the Town in impeding the performance of petitioner's contract obligations.* There is no rule of law more firmly established in the State of Connecticut than that every construction contract contains an implied condition that the owner will do nothing to impede the contractor's performance of his obligation thereunder. *Tompkins, Inc.* v. *Bridgeport*, 100 Conn. 147; *Pinches* v. *Swedish Lutheran Church*, 55 Conn. 183. As stated in *Town of Milford* v. *O'Neil*, 8 Conn. Sup. 403, 432, "there is a duty upon the Town to refrain from interposing any impediment which would interfere with the contractor's orderly and expeditious progress in performing the obligations assumed by him."

Yet in this case, the Town in December 1951—without notice to or knowledge by the petitioner and during the period when petitioner's operations were shut down by winter weather—erected a bulkhead in the trunk sewer into which petitioner's lateral sewers discharged. This bulkhead was removed in February 1952 when the accumulated water behind the bulkhead filled the petitioner's sewers, overflowed the manholes and subjected the sewers and joints to internal hydraulic water pressure. It was only after the bulkhead incident that the Town's engineers for the first time began to observe excessive flows of infiltration from petitioner's sewers. And it was then that the Town insisted that the petitioner reduce the excess infiltration regardless of the cause.

Thus the action of the Town not only was the likely cause of the excessive infiltration but constituted an

affirmative impediment to the successful completion of petitioner's contract obligations. Connecticut law makes such a breach by the Town grounds for an award of damages to the petitioner for the expenses of testing and taking corrective work as demanded by the Town. And that law also denies the Town the right to withhold from petitioner any contract payments for work performed in order to compensate the Town for taking other corrective action.

(4) *Connecticut law required a determination by the District Court that the Town improperly repudiated the contract and improperly terminated petitioner's right to proceed under the contract.* Under the terms of Sec. G15 of the contract, a bilateral examination of completed sewers was permissible; if any defective work was found, petitioner was to bear the cost, but if all was found satisfactory the expense was to be paid for by the Town as extra work. But the Town rejected petitioner's offer to expose the completed sewers in order to find the cause of the excessive infiltration. Instead, at a later date, the Town repudiated Sec. G15 by unilaterally examining completed sewers. Moreover, in contravention of Sec. G15, the Town refused to issue an extra order to pay petitioner for the expense of opening the Penfield Road sewer pursuant to this section; upon that opening, no defects in workmanship were found and the Town's chief engineer conceded that "the sole reason for his conclusion of poor workmanship was the excessive infiltration."

Simultaneously with the refusal to issue an extra order on the Penfield Road sewer examination, the Town warned petitioner that its right to proceed under the contract might be terminated; no specification was made as to the respects in which petitioner had failed to

complete its contract. No other warning or notice was given as to non-compliance. Suddenly, on September 10, 1952, the Town declared the contract terminated. None of the express grounds for termination, contained in Sec. 638, was given as a basis for the action; nor was the termination made upon the required 7-days notice to petitioner.

All of such actions by the Town were in contravention of the express terms of the contract. Connecticut law requires that before a contractor's right to proceed can be terminated, however, the Town itself must be "without fault under the contract." *Tompkins* v. *Bridgeport*, 94 Conn. 659, 679. And Connecticut insists that there be strict compliance with the terms and conditions of any such termination provision, that the grounds for termination be specified; and that such terms and conditions be strictly construed. *Valente* v. *Weinberg*, 80 Conn. 134; *Tompkins* v. *Bridgeport*, 94 Conn. 659. Application of this Connecticut law to the facts of this case makes plain the error of the District Court in giving approval to the repudiation of Sec. 615 and to the termination of the contract by the Town.

(5) *Connecticut law precluded the District Court from receiving or considering evidence of the Town's action in correcting the excessive infiltration following the improper termination of the contract.* In view of the improper termination of the contract by the Town, "evidence of what the defendant did after wrongful termination was clearly inadmissible." *Tompkins* v. *Bridgeport*, 94 Conn. 659. Despite the clarity of the Connecticut law on this point and despite the plain condition of Sec. 615 of the contract, the District Court proceeded to receive and consider extensive evi-

dence as to the action of the Town, following the termination, in awarding a contract to another contractor to study and correct the infiltration situation. Many of the conditions so corrected were discovered from one to two years after the original installation of the sewers, there being no probative evidence that they were traceable to the original installation work or that they were the same conditions that existed at the time of termination. Yet it was on the basis of such totally inadmissible evidence that the District Court made many of its findings and awarded damages to the Town on its counterclaim.

Despite petitioner's emphasis on the foregoing inconsistencies with applicable Connecticut law, the Court of Appeals made it appear that petitioner's main quarrel was with the fact findings of the District Court, which were found not to be "clearly erroneous" under Rule 52(a). The Court of Appeals then went on to discuss what it described as the principal argument against the findings, to wit, that "there was no causal connection between plaintiff's defective workmanship and the excessive infiltration." In affirming the District Court, the Court of Appeals at no point recognized or discussed the egregious failure of the District Court to apply the applicable Connecticut law as above outlined; it merely added that "Failure to discuss other points indicates not that they have been overlooked but that after careful study they have been found to be so lacking in merit as to deserve no discussion."

Following the decision of the Court of Appeals on June 30, 1961, petitioner was without counsel. As a result, the 15-day period allowed for petitioning for rehearing expired. Thereafter, on October 16, 1961,

petitioner, acting *pro se* through its principal executive officer, filed a motion for leave to file a petition for rehearing *en banc* out-of time; the petition itself was attached to the motion. On October 23, 1961, the panel of three judges (Judges Clark, Hincks and Waterman) who had decided the case entered an order denying leave to file the petition for rehearing. Thereafter, on November 9, 1961, Chief Judge Lumbard signed an order stating: "No active circuit judge having requested that the case be reheard in banc, Judge Lumbard not participating in the consideration of the petition, the petition is denied." The accompanying order signed by the clerk formally stated:

> "A petition for a rehearing in banc having been submitted by appellant pro se.
>
> "Upon consideration thereof, it is
>
> "Ordered that said petition be and hereby is is denied."

This petition for certiorari is filed within 90 days of the November 9 denial of the petition for rehearing, but more than 90 days after the original judgment and opinion of the Court of Appeals, entered on June 30, 1961.

REASONS FOR GRANTING THE WRIT

1. The Action of the Court of Appeals Raises An Important and Unresolved Problem in the Calculation of the Time for Petitioning for Certiorari

A petition for a writ of certiorari, in a civil case coming from a federal court of appeals, must be filed "within ninety days after the entry of such judgment or decree." 28 U.S.C. § 2101(c). The period is thus to be calculated from the date of entry of the decree, unless a timely petition for rehearing has been filed. In that event, the petition tolls the 90-day period, which

begins to run again on the date the petition is denied. But an out-of-time petition for rehearing, if not entertained or considered on its merits, would not toll the 90-day period. See *Bowman* v. *Loperena*, 311 U.S. 262, 266 (involving a state court appeal).

In this case, the original judgment of the Court of Appeals was entered on June 30, 1961, and if the 90-day period is to be calculated from that date the instant petition is out of time and this Court has no jurisdiction. But on October 16, 1961, petitioner filed a motion for leave to file a petition for rehearing *en banc* out of time. That motion was denied by the original three-judge panel on October 23, 1961. As of that point, the 90-day period had not been tolled. But then, without any further request from petitioner, all the active judges of the Court of Appeals, save one, gave consideration to the petition for rehearing *en banc* on its merits and denied it on November 9, 1961. The following problems are thereby raised:

(a) It can be argued that the *en banc* court in effect overruled the action of the three-judge panel and granted the motion for leave to file the petition for rehearing out of time. Then, by analogy to state court cases, it can be said that "where the court allows the filing [of a late petition] and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, 311 U.S. 262, 266. And here it is clear from the clerk's certificate that the active judges denied the petition "upon consideration thereof." See p. 4a, *infra*. But there does not appear to be any direct precedent on this point involving a federal court case.

(b) *Conboy* v. *First National Bank*, 203 U.S. 141, indicates, however, that unless a petition for rehearing is filed below within the time for appealing a case to this Court, the right to take such an appeal is lost. Here, of course, the motion for leave to file the petition was not filed until October 16, more than 90 days after the entry of the June 30 judgment. The *Conboy* case would seem to say that the right to petition for certiorari was thereby lost. But the *Conboy* case has been said by competent commentators to be "out of line" with precedent and "to have been overruled." Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson & Kurland ed., 1951), § 384, pp. 770-771.

(c) Prior to 1948 it was settled that in federal courts an untimely petition for rehearing had to be filed within the term of court, if any, in order to prevent expiration of the court's power to change its judgment. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 136. But 28 U.S.C. § 452, enacted in 1948, now provides that the expiration of a term of court in no way affects the power of the court to do any act or take any proceeding. Here the original judgment was entered during what the Court of Appeals described as its "October Term, 1960," while the petition for rehearing was not lodged until October 16, 1961, presumably during "October Term, 1961." Under 28 U.S.C. § 452, the change in terms would appear to make no difference, but the problem has never been passed upon since the enactment of that statute.

The problems as to the powers of *en banc* courts of appeals and their relationships to three-judge panels have been increasing. Compare the problem raised in

No. 598, Oct. Term, 1961, *Drake Bakeries, Inc.* v. *Bakery Workers Local 50*, certiorari granted on January 22, 1962. The problem here rises in the important area of time calculations for petitioning for certiorari, an area of immediate relationship to the jurisdiction of this Court. An examination and illumination of this problem would appear most appropriate.

2. The Refusal of the Court of Appeals to Discuss the Important Issues as to the Application of Connecticut Law to This Diversity Case Raises An Important and Unresolved Problem in Judicial Administration

This Court, of course, does not sit merely to reexamine questions as to the application of state law principles to the facts developed in diversity suits. And petitioner does not here ask this Court to review the judgment below in order to determine what the Connecticut law is or whether the courts below properly applied it. Nor is certiorari sought to review the voluminous record and findings of fact in order to determine if error has occurred in light of Connecticut law.

But petitioner does suggest that the Court of Appeals has closed its eyes to the serious state law issues raised by petitioner and has effectively sidestepped its duty imposed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, and related cases. Under *Erie* it is the inescapable function and part of the staple business of courts of appeals to see to it that appropriate state decisional law is applied in defining state-created rights, obligations and liabilities. Presumably the Court of Appeals for the Second Circuit is especially competent to judge matters of Connecticut law and their application to a diversity suit of this nature. And respect must be accorded that court's statement that it did consider all the arguments advanced by petitioner, despite the

silence as to many of them, and found them to be without merit.

But the fact remains that, considering the serious issues of state law raised by the petitioner in the courts below, and the rather cavalier disposition of those issues by the Court of Appeals, a gnawing question is posed as to whether that court fully performed the function that was given to it by the *Erie* decision. It is easy enough to say that arguments have been considered and found to be without merit. But when issues are thus resolved, issues which go to the very heart of the cause of action, it becomes impossible for any reviewing authority to say what the decision below means or whether any reviewable question is thereby raised.

In finding the state law issues to be so lacking in merit as to warrant no discussion, did the Court of Appeals mean that they were frivolous? Or did it mean Connecticut law was inapplicable in determining whether petitioner or the Town breached the contract or in determining whether petitioner was entitled to recover the unpaid balance due on the contract? Did the court mean, rather, that *Friend* v. *Green*, 146 Conn. 360, 365, was not decisive in the federal courts of the finality of the engineers' determinations made in 1951? Or that *Dahl* v. *Edwin Moss & Son, Inc.*, 136 Conn. 147, 153-4, could safely be ignored so as to permit the District Court to substitute its judgment for that of the engineers? Did the court mean, in other words, to say that the matters raised by petitioner were or could be determined by federal law? Or did it mean to say that the facts were too complicated to go beyond the "not clearly erroneous" test of Rule 52(a)?

In other words, its impossible to tell from the summary disposition of these issues whether there is any

reviewable issue on the merits or on the principles of the *Erie* case. This Court has said in relation to review of administrative orders that a court must know what an administrative decision means before the court can exercise its duty to say whether it is right or wrong. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511. And so here, we must know what the decision below means before this Court can say whether it falls within the allowable judgments of the lower court or whether it represents a departure from accepted principles warranting review by this tribunal. At least where the points raised are not plainly frivolous (and there has been no claim of frivolity in this case) and where the points are vitally enmeshed with the cause of action and the right to recovery, some exposition of the points raised would seem a minimum requirement under *Erie*. Especially is this true where the matter raised is not an isolated one but involves a whole host of state law problems. To ignore them in such circumstances is to engage in a wholesale disregard of litigants' rights under the *Erie* doctrine.

To the end that the Court of Appeals should be compelled to consider more thoroughly the state law questions raised by petitioner, the decision below should be reviewed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner.

February 6, 1962

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirtieth day of June, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

E. TOTONELLY & SONS, INC., of Newburgh, New York,
Plaintiff-Appellant,

v.

TOWN OF FAIRFIELD, *Defendant-Appellee.*

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

E. Totonelly & Sons, Inc., of Newburgh, New York,
Plaintiff-Appellant,

v.

Town of Fairfield, *Defendant-Appellee.*

Motion for leave to file petition for rehearing denied.

C.E.C.
C.C.H.
S.R.W.
U.S.C.JJ.

Oct. 23, 1961.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-third day of October, one thousand nine hundred and sixty-one.

Present:

Hon. Charles E. Clark,
Hon. Carroll C. Hincks,
Hon. Sterry R. Waterman,
Circuit Judges.

E. Totonelly & Sons, Inc., of Newburgh, New York,
Plaintiff-Appellant,

v.

Town of Fairfield, *Defendant-Appellee.*

A motion having been made herein by appellant pro se for leave to file a petition for rehearing,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

E. TOTONELLY SONS, INC., of Newburgh, New York,
Plaintiff-Appellant,

v.

TOWN OF FAIRFIELD, *Defendant-Appellee.*

Petition for Rehearing In Banc

FRANK E. TOTONELLY,
Newburgh, New York,
pro se.

No active circuit judge having requested that the case be reheard in banc, Judge Lumbard not participating in the consideration of the petition, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

9 November 1961

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of November, one thousand nine hundred and sixty-one.

Present:

Hon. Charles E. Clark,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Hon. Thurgood Marshall,
Hon. Paul R. Hays,
Circuit Judges.

E. Totonelly Sons, Inc., of Newburgh, New York,
Plaintiff-Appellant,

v.

Town of Fairfield, *Defendant-Appellee.*

A petition for rehearing in banc having been submitted by appellant pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 346 October Term, 1960.

(Argued May 23, 1961 Decided June 30, 1961.)

Docket No. 26531

E. TOTONELLY SONS, INC., of Newburgh, New York,
Plaintiff-Appellant,

v.

TOWN OF FAIRFIELD, *Defendant-Appellee.*

Before: CLARK, HINCKS AND WATERMAN, *Circuit Judges.*

Opinion

Appeal by the plaintiff-contractor from a judgment of the United States District Court for the District of Connecticut, Robert P. Anderson, *Judge*, dismissing plaintiff's complaint for breach of a sewer contract and awarding damages to the defendant on its counterclaim for the cost of repairs, necessitated by defective work of the contractor.

Affirmed.

WALTER W. DOWNS, Hartford, Conn. (Stickles, Hayden & Young, New York City, on the brief), *for plaintiff-appellant.*

DAVID S. MACLAY, Bridgeport, Conn. (Marsh, Day & Calhoun, Bridgeport, Conn., on the brief), *for defendant-appellant.*

HINCKS, *Circuit Judge:*

Plaintiff, a contractor, was engaged by the defendant Town to construct and install certain sewers. Because of the excessive infiltration of ground water into the sewer lines, the defendant was unsatisfied with the result of plaintiff's work and withheld payments under the contract. This lawsuit followed. Plaintiff appeals from the dismissal of its complaint, which sought to recover contract balances, claims for additional work, and damages for the Town's alleged breach of contract, and from the earlier entry of summary judgment against it on counts for additional work due to subsurface conditions not shown in the plans and specifications and for damages resulting from the stoppage of work because of the defendant Town's failure to obtain easements. Plaintiff also appeals from a judgment awarded to the Town on its counterclaim for amounts expended on the repairs necessitated by plaintiff's defective work.

The trial of this case was before Judge Anderson, sitting without a jury, and extended over a period of eighty-three trial days, from June 7, 1956 to June 14, 1957. In his decision, filed March 24, 1958, Judge Anderson made sixty-six detailed findings of fact and concluded that "the plaintiff did not fulfill its obligations under the contract either completely or substantially and thereby breached the contract without justification or excuse." In short, Judge Anderson found plaintiff's workmanship to be faulty and that the excessive infiltration was not attributable to any

inadequacy in the defendant's plans and specifications. Accordingly, he dismissed the first five counts of the complaint and awarded damages to the defendant on its counterclaim.

The main thrust of plaintiff's argument on appeal is pitched on attacks upon Judge Anderson's findings. It is argued in great detail that a bulkhead erected by the Town caused damage to the joints in the sewer lines; also that the Town's specification of vitrified clay pipe and bituminous joints in "wet" conditions was the cause of the excessive infiltration. After careful examination of the record bearing on these contentions we are satisfied that none of the challenged findings, either those pertaining to the central problem of the responsibility for the excessive infiltration or those involving ancillary issues, are "clearly erroneous" under Fed. R. Civ. P. 52(a).

The principal argument directed against the challenged findings, and the only one which we will discuss, is that there was no causal connection proved between plaintiff's defective workmanship and the excessive infiltration. Reliance is placed upon *Town of Milford* v. *O'Neil Bros., Inc.*, 8 Conn. Supp. 403, a case which also involved excessive ground water infiltration and charges of faulty workmanship in sewer construction. But *O'Neil*, even if determinative of the law of Connecticut under the doctrine of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, does not determine the facts of this case. And merely because a workmanship-infiltration link did not exist in *O'Neil*, it does not follow that such a link was not proved here. In *O'Neil*, the town produced no evidence of fault on the part of the contractor and it was expressly held that "as a matter of law * * * the existence of excessive infiltration does not constitute a breach of the contractor's undertaking and * * * liability can be imposed upon it only if it be established that the materials furnished [by the contractor] or the method of doing the work did not meet

the requirements of the drawings and specifications or in some material way departed from the proper orders of the engineer having supervision and direction, or satisfying the demands of plans and specifications, yet was not performed in a workmanlike manner. This latter poses a question of fact * * *." 8 Conn. Supp. at 415. In short, it is the law of Connecticut that the plaintiff here must fail if it is established that the excessive infiltration was caused by his defective workmanship. And here, the record is replete with evidence of faulty workmanship from which the inference of the causal relationship was fully justified.

We will briefly discuss the other principal claims of error. Appellant argues that its workmanship is not subject to question because it was "approved" by the Engineer as it progressed. That is, it argues that contractual provisions that "the Engineer shall in all cases determine classifications, quantities, quality, acceptability and fitness of the several kinds of work" and that "the Engineer will estimate the amount of work done and materials built into the work * * * [and shall use] the quantities so determined * * * as the basis for an approximate certificate, which shall be presented to the Commission * * * and shall certify the value of the work performed * * *" amount to a submission of the question of workmanship to the arbitration of the Engineer. A comparison of these clauses with that involved in one of the Connecticut cases on which the plaintiff relies, *George S. Chatfield Co.* v. *O'Neil*, 89 Conn. 172, casts considerable doubt on its argument.[1] But close analysis is unnecessary, and the argument is completely

[1] In the *Chatfield* case the contract provided: "It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final." 89 Conn. at 173.

refuted, by another contractual provision: "Failure on the part of the Engineer or any of his authorized agents to detect inferior work * * *, and condemn the same, shall not be construed to imply an acceptance of such work * * *; nor shall it be construed as barring the Municipality, at any subsequent time, from the recovery of such sum of money from the Contractor as may be needed to construct or build anew all portions of the work in which * * * improper work [was] executed."

Appellant further claims that it was not bound by section D66 of the Detailed Specifications requiring completion within a stated infiltration allowance on the ground that the contract provides that in the case of any inconsistency between the contract and an earlier contract document, the contract shall govern. It then points to the contract clause that the contractor shall furnish all the labor and material for the completion of the contract "in the best possible and most expeditious manner, and in accordance with the contract documents and their intended meaning," contending that this clause is inconsistent with, and hence supersedes, the infiltration clause of section D66. The opposite, of course, is true. This contract provision calling for completion "in accordance with the contract documents" incorporates the infiltration specification; indeed, by paragraph 1 of the contract it was expressly stated that "the Contract shall consist of this instrument, * * * and all the other Contract Documents as defined in the volume entitled 'Specifications, Sewerage System, Contracts * * * VIII * * *, Town of Fairfield * * *.' All of said documents are made part of this instrument with the same force and effect as though fully set forth herein." Appellant's contention of an "inconsistency" between Specifications D66 and the contract is so patently ridiculous that it should not have been made.

As for the claims dismissed by summary judgment, there is no error. On the sixth claim the plaintiff did not apply

for a written order, which the general specifications makes a condition precedent to a claim for more than the unit prices. And the seventh claim is barred by another section of the general specifications which provides that there shall be no additional compensation or damage claims for delay in the acquisition of interests in land.

Failure to discuss other points indicates not that they have been overlooked but that after careful study they have been found to be so lacking in merit as to deserve no discussion. This applies not only to the attack on the dismissal of the complaint but also, equally, to the attack on defendant's judgment on the counterclaim.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

E. TOTONELLY SONS, INC., of Newburgh, N. Y., *Plaintiff*,

v.

TOWN OF FAIRFIELD, *Defendant*.

Civil File No. 3919

Opinion of Anderson, J.

This action was brought in seven counts. The defendant Town made a motion for summary judgment which on June 1, 1956 was denied as to the first and second counts. These first two counts allege respectively: (1) breach of contract in failing to make full payment after completion of performance by the plaintiff; and (2) negligence on the part of the defendant and its agents, the engineers, (a) in drafting plans and specifications which were defective and not properly designed to provide, under the circumstances, sewer lines which would meet the

infiltration allowance of 5,000 gallons per mile per day; and (b) in damaging the plaintiff's work by erecting a bulkhead at the trunk line sewer.

The third count, after the ruling on summary judgment, left three matters to be decided at the trial: first, whether the plaintiff was entitled to rely on the word "datum" in the plans and specifications as meaning "mean sea level", second, whether the plaintiff was entitled to assume that the ground water level in the contract area was approximately the same as mean sea level, and, third, whether the plaintiff had a duty to follow contract specified procedure in claiming as an extra the unanticipated expense of dewatering trenches by well-pointing and pumping to get rid of or to lower ground water in excess of what it counted upon when it made the contract. [13214] The first and second of these questions are answered in the negative. The third is answered in the affirmative but this answer is only of academic interest because no matter what procedure the plaintiff followed, it could not recover for the extra expense of deeping down the unanticipated ground water. The plaintiff had a duty to examine the terrain and make its own determination of the nature of the area in which the work was to be performed. Its check upon the amount of ground water in this low-lying tidal area was most perfunctory and inadequate and the plaintiff became the victim of its own negligence in this regard. The plaintiff argues that *U. S. v. Spearin*, 248 U. S. 132, 137, relieves it of any duty to make such an examination because the Supreme Court there said, "The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril whether the sewer specifically prescribed by the Government would prove adequate." However, this is quite a different thing from saying that the plaintiff had no duty to examine the terrain to determine the conditions under which he had to perform the work which

he had contracted to do and among other things compute the number of well-points that would be required. Such a determination in the present case was plainly the plaintiff contractor's responsibility.

The fourth count was abandoned by the plaintiff in the course of the trial for lack of produceable evidence.

The fifth count is a claim for the extra expense incurred by the plaintiff in making certain infiltration tests to determine where there was excessive leakage in the sewer [13215] lines and in making repairs and performing certain corrective work in a limited area. This basis of claim necessarily falls with the finding of improper workmanship and breach of the contract hereafter mentioned in the discussion of counts one and two.

The motion for summary judgment was granted as to the sixth and seventh counts.

The real issues in this lengthy trial, which lasted eighty-three trial days, stem from counts one and two of the plaintiff's complaint and from the defendant's cross-complaint. The case presents a factual issue between defectively designed plans and specifications as urged by the plaintiff on the one hand and poor workmanship as urged by the defendant on the other hand. Early in the trial the plaintiff made the claim of impossibility of performance and while at the end of the trial it stated that the contract was not impossible of performance, it did charge that the defects and shortcomings of the plans and specifications rendered it impossible to build a sewer, the allowable infiltration rate of which was within 5,000 gallons per mile per day. The plaintiff contractor, in entering into the contract with the Town to construct sewer lines in the Contract VIII area of the Town of Fairfield, had a right to rely upon the assumption that, if it constructed the sewer line in a good and workmanlike manner in strict accordance with the plans and specifications, the rate of infiltration would not exceed the allowable limit

set forth in the specifications; and, if the plans and specifications were so defective and so ill adapted to the purpose for which they were made in the place where the sewer was to be constructed that it would not be possible for such a sewer line to achieve [13216] a rate of infiltration within the limits so specified, the contractor would be entitled to recover the full contract price from the Town. *U. S.* v. *Spearin*, 248 U. S. 132 (1918); *Fabia Quarries, Inc.* v. *Central Nebraska Public Power and Irrigation District*, 64 F. Supp. 200, 212; *Hills* v. *Farmington*, 70 Conn. 450 (1898); *Tompkins* v. *Bridgeport*, 94 Conn. 659 at 674 (1920); *MacKnight Flintic Stone Co.* v. *New York*, 160 N. Y. 72, 81, 54 N. E. 661 (1899); *Bass* v. *Lakeview Development*, 133 N. Y. S. 641 (1954); Cincinnati Law Review, Volume VI, No. 2, page 121, March 1932; 88 A. L. R. 797. The law of Connecticut rejects the theory of express warranty by the contractor of the satisfactory performance of the sewer lines in spite of the impossibility of performance due to defective plans and specifications. In the present action the Court has found that the plans and specifications were not defective and that it was not impossible for the sewer lines, properly constructed, to have met the prescribed limit of infiltration. The issue of the case is resolved by the finding of poor workmanship which was the cause of the failure of the sewer lines adequately to fulfill the purpose for which they were built without particular regard to the limitation on the infiltration rate provided in the contract. *Robinson* v. *U. S.*, 261 U. S. 499 (1923). The plaintiff relies heavily upon a Connecticut case, decided by the Superior Court, *Milford* v. *O'Neil Bros., Inc.*, 8 Conn. Supp. 403. That case is distinguishable from the present case in many respects. It is sufficient, however, to point out that in the *O'Neil* case there was no evidence of defective workmanship or of the use of defective materials by the contractor.

The plaintiff claims that it substantially performed its obligations under its contract with the Town and that it

carried out all of the work called for in strict compliance [13217] with the plans and specifications in a good and workmanlike manner. The plaintiff asserts that the extent to which the performance by the Contract VIII sewer lines fell short of meeting the infiltration allowance of 5,000 gallons per mile per day in the Fall of 1951 was due entirely to defects in the plans and specifications and a failure by the engineers to detect and order corrected any error in construction. It also argues that the greatly increased infiltration into the lines revealed by the June, 1952, tests was produced by a further maturing of the innate defects in the plans and specifications and by the damage done to the lines by the erection by the Town in December, 1951, of a bulkhead in the trunk sewer line.

The Court, however, has found that there was a great deal of bad workmanship which created flaws and defects in the joints in the Contract VIII lines causing them to leak excessively. There was not a compliance with the plans and specifications and the plaintiff's work fell far short of substantial performance.

The plaintiff also relies greatly upon the series of infiltration tests made between July 27, 1951 and September 24, 1951, to show that it had substantially fulfilled the contract. Even if the fact that these were but preliminary sectional tests and not tests of the whole system were disregarded, the evidence of excessive and rapidly accelerating infiltration of the Pennfield Road lines in test areas 8 and 9 was so clear that it was not in a position rightfully to claim, as it attempts to do, that it had substantially performed by December 14, 1951. The issuance of nine "approximate certificates" between June, 1951, and January, 1952, were not final acceptance of the plaintiff's work under the contract and a release of its obligations. At most, they meant that the [13218] plaintiff had put in so many feet of the pipe lines; they were only estimates of the value of the work done and were

subject to subsequent revision. While complete tests had not been made of the whole system, it then appeared to the engineers that the 10% retained would be ample to cover any deficiencies in performance arising in the Pennfield Road area and the untested sections. They also relied on the plaintiff's agreement to return in the Spring of 1952 to make further tests and correct any defects in the line. At that time, December 14, 1951, the plaintiff did not claim that it had completed its contract nor did it ask for the final completion certificate which was provided for in the contract and which was designed to evidence the satisfactory completion of the contractor's work and the acceptance of it by the Town.

The plaintiff also lays great stress upon the broad powers given to the engineers under the contract and specifications. It argues that because the engineers could maintain a continuous inspection of the plaintiff's work and because they did keep an inspector on the job and because no complaint was made by the engineers to the plaintiff contractor about improper workmanship or defective materials and because the engineers had the authority to order the contractor to do differently from what it was doing, but up to December 14, 1951, had not done so, that therefore, the Town cannot at a later date charge the plaintiff contractor with poor workmanship or with the use of defective material. The plaintiff construes the powers of the engineers to be of such a nature and so far reaching that they, in effect, change the status of the plaintiff as an independent contractor to that of a servant and employee of the engineers with the entire responsibility for the proper carrying out of the work under the contract resting upon the engineers. The contract and specifications admit of no such construction. While the engineers had the power to make [13219] changes in the contractor's method of work and in its use of materials as they might deem necessary for the proper carrying out of the contract, they were under no

duty to the plaintiff contractor to order such changes and thereby relieve the contractor of its duty to comply with the plans and specifications and perform the work in a good workmanlike manner. It is, of course, true that if the engineers had ordered the contractor to adopt certain specific materials or certain specific methods of performing the work, different from what the contractor itself had selected and that in consequence of the changes ordered by the engineers, defects in the sewer lines resulted, then the defendant Town would be estopped from charging the plaintiff contractor with the responsibility for those defects; but there is no evidence that any such thing happened in this case. The plaintiff points out that in the course of the work on Pennfield Road the foreman urged the engineers to order a broken-rock foundation three feet in depth and that the engineers ordered such a foundation for a depth of only one foot, but this is not shown to have been the cause of any defects in the line. The reexcavation showed the pipe to have remained true in line and grade.

Nor has the plaintiff proven that there was anything defective about the plans and specifications. It must be concluded that they were standard and followed approved and orthodox engineering practices for the installation of sewer lines in ground such as that involved in the Contract VIII area of the Town of Fairfield in 1951. The plaintiff's experts offered no convincing adverse criticism of the plans and specifications; and its principal consultant, the witness Camp, except for his residual tension theory, could only say that the infiltration allowance should have been more liberal.

[13220] The plaintiff has failed in the burden of proving its claim that the nature or composition of the bituminous compound was such that after being properly heated and poured into a well-prepared joint, there was set up within it, as it cooled and shrank, a residual tension which

caused breaks in the bond (i. e., separations) between the adjacent surfaces of the pipe and the compound. The plaintiff advanced this theory in partial explanation of the apparent deterioration of the Contract VIII lines after the preliminary but incomplete tests of July, August and September, 1951. Parenthetically it may be noted that the principal cause of the increased infiltration flow in the Spring and early Summer of 1952 was because at that time more of the lines were under water than in the Summer of 1951 and the portions which had been under water in 1951 were, in 1952, under a greater head of water. It could not be found that residual tension caused the breaking of the bond in any of the joints. The compound material was substantially uniform in its composition as it was used throughout the Contract VIII area. There were dozens of joints, many in the deepest trenches under the greatest head of water which showed no such bond breaks or deterioration of any kind. When the compound was properly heated and poured into a well-prepared annular space there was at no time, as it cooled and shrank into a viscous solid, sufficient force in any residual tension set up within it to break the bond of the joint, for the residual tension was released in the face or free side of the joint as the result of which the face of the joint developed a characteristic "piping" or concavity. This, however, presupposes a properly primed and properly poured joint. If at a particular joint [13221] the adhesion of the compound to the adjacent tile was very weak when the joint was poured, either because the priming was poor, or the compound was too cold or there was water or dirt in the annular space or a combination of two or more of those factors, then the residual tension might in part be released at the area of such very weak adhesion, which would in effect be another free side in addition to the face of the joint, and would result in a separation.

Although under the terms of the contract the plaintiff was to have completed its work on January 5, 1952, the defendant through its engineers, had acquiesced in the plaintiff's request to discontinue its work during the winter months and accepted the plaintiff's promise to return in the Spring to replace walks, curbs, lawns, trees and other similar work, to work on the punch list, to make further infiltration tests and to do corrective work where there were leaks causing excessive infiltration. In effect, the defendant agreed to extend the completion date to such a date as would afford the plaintiff a reasonable opportunity, through diligent prosecution of the work, to complete the contract. The plaintiff did return with a small force on April 1, 1952. It performed some of the lawn, sidewalk and curb work and in the next three weeks made some repairs to leaks in the sewer line. Though requested by the engineers it refused to prepare for infiltration tests. On May 27, 1952 the plaintiff discontinued its work. By this time it had become apparent to both of the parties that the Contract VIII lines were leaking very badly. Neither party was entirely certain of the cause. At this time the engineers had no specific knowledge of the exact nature of the widespread defects in the joints of the sewer line. They had observed widespread leakage and, based solely on an inference [13222] from the presence of excessive infiltration, had concluded that it was attributable to poor workmanship by the plaintiff. The plaintiff did not until May 24, 1952 make any claim of defects in the plans or specifications nor until the commencement of the action did it accuse the Town of damaging the Contract VIII lines by the erection of a bulkhead at the trunk line sewer. When the plaintiff terminated its work on May 27, 1952, it had neither fully nor substantially completed its work under the contract; and by its action in discontinuing its work and in failing to make a reasonable effort to complete it between April 1

and May 27th, the plaintiff repudiated its obligations under the contract.

The infiltration tests made by the engineers in June, 1952, was a first step in the process of attempting to locate and ascertain the nature of the leaks in the system. There there was excessive infiltration into the lines was already apparent. The tests showed an infiltration rate of 41,000 gallons per mile per day, compared with 5,000 gallons allowable. The total gallonage was 318,495 gallons compared with 32,615 gallons allowable.

The plaintiff retained counsel on June 24, 1952 and commenced this action on July 28th. At this time it asserted its claims of defective plans and specifications, misrepresentation by the engineers as to datum and ground water level and damage to the lines from the trunk line bulkhead. In spite of the later assertion by the plaintiff at the trial of this action that it had completed or substantially completed its work under the contract by December 14, 1951, notwithstanding the excessive infiltration shown by the September, 1951, tests to be present in the line in Pennfield Road, it is apparent [13223] that the plaintiff about August 1, 1952 felt that it was vulnerable to a charge of repudiation and abandonment of the contract, and through its counsel sought an opportunity to excavate the line in Pennfield Road for the purpose of making any necessary repairs to reduce the rate of infiltration to allowable limits. By so doing it sought to negative the defendant's claim of repudiation and lay a better foundation for its own claim, advanced at a later date, of having completed the work. Both parties at this time were interested in determining the kinds of defects which were causing leakage in the joints. The defendant consented to the resumption of work in the area by the plaintiff on condition that it correct the causes of excessive infiltration in the Contract VIII lines. Between August 15, 1952 and September 5, 1952 the plaintiff uncovered,

inspected, repaired and covered again about two hundred forty feet of the sewer line on Pennfield Road, near Edwards Street. The plaintiff made no effort to uncover and repair defects which were causing excessive infiltration in other parts of the Contract VIII lines. The plaintiff did not fulfill the condition on the fulfillment of which, the plaintiff in resuming work in the area could, by completing the repairs to the Contract VIII lines, have taken advantage of the defendant's offer to waive its right to terminate the contract. The plaintiff in resuming work in the area on August 14th reserved its right to set up any claim it might feel justified in making, based upon what might be discovered about the nature of the defects in the sewer line which was uncovered. The work done by the plaintiff between August 14 and September 5, 1952 did nothing to alter the rights of the parties as they existed at the time of the commencement of [13224] this action. On August 25, 1952 the plaintiff notified the defendant that the defects which were causing the excessive infiltration were not the responsibility of the plaintiff contractor and implied that it had completed and fully performed its obligations under the contract. On September 3, 1952 the defendant formally charged that the excessive infiltration was due to the plaintiff's poor workmanship and issued another notice of warning. Thereafter on September 29, 1952 the defendant gave the plaintiff formal notice of termination of the contract.

On September 30, 1952 the engineers with the aid of the Clark and Fray Construction Co. made a field survey of the Contract VIII lines to determine the areas of worst leakage. On November 25, 1952 the Town hired Clark and Fray on a cost plus basis to excavate the areas in which the worse leakage appeared and make the necessary corrections. Beside what was shown by the plaintiff's excavation, the 14,706 lineal feet of main sewer and 5,179 lineal feet of appurtenant house-connections uncovered by Clark and Fray disclosed the specific defects

in the joints which were causing them to leak and which provided the sources of the excessive infiltration.

Before discussing these defects mention should be made of the plaintiff's claim that the defects in the joints were caused by the erection by the defendant of a bulkhead at the junction of the Contract VIII lines and the trunk sewer in December 1951 - January, 1952, which prevented water which had infiltrated the Contract VIII lines from flowing out into the trunk line and thence to the treatment plant. It is the plaintiff's contention that the bulkhead backed the water up in the lines and exerted an exfiltrating or back pressure on the joints and against the compound which is wedge-shaped and [illegible] designed to withstand pressure from the outside. The evidence shows that such a bulkhead was erected and that at one time water came out of the tops of some manholes in the area of low ground elevation. But there is no evidence whatever to substantiate the plaintiff's claim as to internal pressure or any damage to the joints resulting therefrom. In the first place the water in the lines must have come from the already existing infiltration of ground water from outside. There is no evidence to show that at any point, except at the manhole tops, that the internal pressure exceeded the external pressure and, assuming such excess, whether it was not wholly relieved by the flow through the tops of the manholes.

The plaintiff claims that during the period of the existence of the bulkhead the ebbing and flowing of the tide exerted a "push-pull" effect on the Contract VIII sewer line joints. No expert of the plaintiff's testified to any such thing and no evidence was offered from which a conclusion could be drawn that any such thing happened. It rests solely upon a generally affirmative answer by the defendant's engineer Allen when the proposition was put to him on cross examination. The Court must reject it. Apparently the plaintiff conceives of the action of the

tide in the few yards from the shore in which it affects the ground water level as a kind of underground stream going northwesterly on the flood and southeasterly on the ebb six hours later. But this is not completely accurate. The movement of ground water is from the uplands down to sea level. Where, as in this part of the Fairfield shore, the soil is mostly sand and gravel, the flooding tide does tend to penetrate the earth and gradually raises the ground water—an influence which [13226] lessens as it goes inland until it tapers off to nothing. On the ebb the ground water is lowered again. For those parts of the sewer line in the area so affected which were under water at low tide anyway, this gradual raising and lowering of the ground water level above it had no effect because the pipe remained full of water all of the time. It was not flowing into the pipe on the flooding of the tide and out of it on the ebb. Theoretically there were sections of the pipe where the level of the pipe came above the ground water level and where the ground water would rise and fall with the flow and ebb of the tide. These sections would be in an irregular band crossing the Contract VIII area, determined by the meeting of the invert of the pipe and the line of the ground water level. Where such sections were located and the number of joint defects which may have appeared in those sections are not shown in the evidence. Joint defects in this irregular band may have been more or they may have been less than in areas outside of those sections. What evidence there is would indicate that, at the time the bulkhead was in, the Contract VIII lines were full of water and there was a lot of ground water in the surrounding terrain. There was no evidence that the water coming out of the manholes in the lower areas came out for the six hours of flooding tide and ceased for the six hours of ebbing tide and so on. In any event there is insufficient evidence upon which to base a conclusion that the ebb and flow of the tide caused openings in the sewer joints.

There was nothing in the appearance or character of any of the joint separations or openings from which an inference could be drawn that they were caused by internal pressure. There were no fragments or sections of compound which appeared pushed out from behind. Nor was there any [13227] persuasive or substantial expert opinion which said that any of the defects were caused by pressure exerted from the inside. The plaintiff's principal consultant, the witness Camp, obviously shied away from supporting the plaintiff's claim in this regard. Its theory that the placing of the bulkhead was a source of damage to the joints must be rejected.

Practically all of the defects demonstrate from their very nature and character that they resulted from poor workmanship in the original laying of the sewer by the plaintiff contractor. For instance: the sides of the voids in the compound and the appearance of the compound bordering sections of the annular space where there was an absence of compound all the way through to the jute or to the shoulder of the bell, had the smooth and shiny appearance resulting from the cooling of the molten material; bubble voids where there was only a thin shell of compound along the sides of the annular space and across its face; joints where the compound before cooling had flowed through the back of the joint into the interior of the pipe; instances of jute hanging down inside of the pipe from the back of the joint; joints on which the asbestos gasket had never been removed; instances of ineffective caulking with cement and tin or pieces of pipe, and other similar characteristics of the uncovered sections of the Contract VIII pipe line point inevitably to the creation of these defects through poor workmanship at the time the pipe line was laid. No other explanation is reasonable or logical. In many of the joints the course of infiltration was shown by a rust-like discoloration through the joint to a deposit of like material and color inside of the pipe.

It is perhaps somewhat surprising that so many defects should go undetected either by the plaintiff's superintendent [13228] or foreman or by the inspector for the Town. There were occasions when there were as many as four crews working at the same time and one inspector could not continuously cover them all. Many of the defects were concealed and difficult to see and the nature of the work was such that the issue of whether in every instance a good or poor joint was made or whether backfill had been properly or improperly tamped down under pipe or connections was determined by the workman down in the trench actually doing the job. At the time that these sewer lines were constructed there was a shortage of skilled help for this type of work in this part of the country. Although the plaintiff in good faith was willing to pay premium wages to procure competent employees, it was not able in all cases to get them. The testimony of two of these workmen was very revealing on this point. Prior to working on the Contract VIII sewer neither had had actual experience in making this kind of sewer joint before, although if is an operation which requires training and skill. One of them received a certain amount of instruction before starting work. The other one had none. One of them revealed what the Court must conclude was a major cause of bond failure resulting in separations and that is, that contrary to the requirement accepted by the experts that twenty-four hours should be allowed for the primer in the bell and on the spigot to dry, the practice on that portion of the job with which the witness was concerned was to use the pipe an hour after the primer had been put on when it was in a tacky rather than in a dry condition. The same witness testified that he did not use any clay dams for the purpose of "topping off" the pour. One of the plaintiff's foremen expressed the opinion that there was no need for such clay dams, while the other foreman [13229] thought it a good procedure but could not remember using it.

One probable source of joint defects was pouring some of the joints with the compound at too low a temperature. This, either alone or in combination with water or dirt in the annular space, was likely to cause openings of various kinds in the joints. No thermometers were used on the job accurately to ascertain the temperature of the compound when it was taken from the heating kettle for use in the trouble, and, although long experience in observing its workability might qualify some to pass upon the propriety of using it when it was first used after coming from the heating kettle, the plaintiff's foremen continued to permit it to be used until it had cooled to the point where it either began to look like jelly or congeal in the spout in the pour-can. To continue to pour cooling compound to the point where these characteristics began to appear was, under the circumstances surrounding the Contract VIII work, an open invitation to defects and an improper procedure.

The plaintiff advances the argument that the failure by the defendant's inspector to detect the use of improper workmanship or materials should now bar the defendant from raising any question about them. Such a proposition is, of course, wholly untenable. The defendant owed no duty to the plaintiff to detect failures by the plaintiff's workmen. The provisions of the contract (Exhibit B, 615) make this perfectly clear and even in the absence of the contract provisions, the law does not permit the contractor to get away with improper workmanship just because the workman did not happen to be caught by the inspector at the time.

The plaintiff also argues the conclusiveness of [13230] a demonstration of joint pouring under various circumstances which took place at Hamden, Connecticut on May 23, 1957, and which was observed by the parties and the Court. The joints were poured by one of the joint pourers who worked on the Contract VIII job in Fairfield in 1951.

At that time he had had no previous experience. At the time of the demonstration in Hamden, he had had six years experience in the business of pouring joints. The conclusions which the Court drew from the demonstration were that if sufficient compound is rapidly poured into the annular space when the compound is hot enough to have a thoroughly free liquid flow, a tight joint may result assuming the pipes are properly primed and are squarely butted, properly caulked and with the snake and clay dam properly applied even though there may be water or dirt in the annular space. It was also observed that the so-called "cold pour," having a temperature of 290° F. or 310° F. (two thermometers didn't agree), showed a very low degree of viscosity and no evidence of a jelly like appearance or of flooding the spout up on the pour-can. Most of the joint pourings showed that, with the use of the materials specified, an apparently tight joint could be poured. The demonstrators used thermometers. In the pouring of one joint, the workman, in spite of his years of experience failed properly to butt the spigot against the shoulder of the bell; and, unknown to him until it was pointed out to him later, compound ran out through the back of the joint and formed an obstruction inside of the pipe quite similar to some of the defects found in reexcavation of the Contract VIII lines.

Although the plaintiff's experts testified to the contrary, it claims that defects in the joints cannot be [13231] caused by water or dirt in the joints or by pouring cold compound (i.e. compound at 290° F.—310° F. or above) and that the demonstration proved these things. The demonstration, however, only supports the plaintiff's contention to the extent that it showed that a joint may be tight in spite of the presence of water, dirt, etc., but not that it necessarily will be. It is interesting to note that the demonstration joint, poured with cold (i.e. at 310° F.) compound with the bell partly in water (Exhibit BX-6), while it appeared sound shortly after the demonstration was completed, it later

showed a separation about one inch deep at its deepest, at an approximate 6 to 8 o'clock position. This is an illustration of an area of initially very weak adhesion constituting, in addition to the face of the joint, what was in effect another free side, pulled away by the release of residual tension.

The plaintiff also urges that many of the separations were caused by the solvent action of the creosote oil with which the specified jute was treated. Several days after the demonstration at Hamden a joint was broken open to show some dissolution of those portions of the primer and the back side of the compound in the annular space where they came in contact with the treated jute. The plaintiff's expert who testified on this subject said that over a period of time contact between treated jute and the joint compound might dissolve as much as 1/16 of an inch of the contact surface of the compound. The specifications did not call for any particular brand of treated jute. It described the caulking as jute treated with a "bituminous compound". The particular treated jute which was used was selected by the contractor. It appears to have been the kind of treated jute which had [illegible] been used as standard in the construction of sewers for many years although some experts prefer dry or untreated jute. There was no evidence at all in the case which offered to show that any such dissolving action had taken place in any joint in the Contract VIII lines, nor did any expert in the case offer it as his opinion based upon conditions found or observed in the joints of the Contract VIII lines that such dissolving action had caused any separations or openings in the joint. Even if it is assumed that the treated jute produced such a reaction in the compound its only contact with the compound was in the very back of the joint and there was no testimony to show that the maximum dissolution of a sixteenth of an inch in the compound at that point would probably produce a weakness in the joint from which leakage would result. If the theory is that in the process of

caulking the joint with treated jute, creosote oil would rub off on the primer on the inside of the bell and on the outside of the spigot, then in the exercise of good workmanship, the plaintiff should have adopted means to prevent the contact between the treated jute and the areas of the primer with which the hot compound would make contact or immediately after caulking, wipe such oily residue from the primer.

The defendant had the right under the contract to have the work done by the contractor in a good and workmanlike manner. Both parties agreed that in sewer lines of vitreous tile with bituminous joints absolute water tightness of all pipes and joints cannot practically be required, even with good workmanship, for human error may accidentally occur and for this reason the tolerance of 5,000 gallons per mile per day is allowed; but it was not designed to give tolerance to [13233] obvious and readily correctable defects in the course of construction or to acquiesce in large number of defects resulting from careless workmanship which produced an infiltration flow way in excess of the most generous application of "substantial compliance," such as have been found in the Contract VIII lines.

It is not necessary in this case to determine whether the infiltration allowance provided in the contracts is a measure of performance or a test of workmanship. As stated above the Court is not of the opinion that the Contractor gave a warranty that construction of the sewer in accordance with the plans and specifications would produce a result within the specified infiltration limits nor did it guarantee to achieve that result in any event. The Court has found no defects in the plans and specifications which were contributing causes of the infiltration. Absent faults in design and considering the circumstances of the case, the infiltration allowance appeared to be reasonable, and rates of flow above the specified rate have in the finding and discussion, for convenience, been referred to as excessive

infiltration. But it would not have altered the decision in this case if there had been no mention of infiltration in it. The contract was breached because the work was not done according to the directions in the plans and specifications and in a good and workmanlike manner.

In view of the plaintiff's repudiation of its obligations under the contract and its refusal to complete it, the defendant was justified in hiring the Clark and Fray Construction Company to make sufficient repairs to place the Contract VIII sewer lines in reasonably workable condition [13234] in the light of the contract specifications. The Clark and Fray Construction Company under the direction of the engineers excavated and repaired or replaced only those areas showing the greatest leakage. It is likely that observable leaks in the remaining 16,057 feet of the vitrified clay sewer pipe lines of Contract VIII were attributable to other instances of defective workmanship. However, the defendant makes no claim for any damages in connection with these remaining portions of the lines. It was not feasible for the defendant to make a contract for the excavation, replacement and repairs on anything other than a cost-plus basis.

With the exceptions hereinafter noted, it appears that the corrective work performed by Clark and Fray was, under the circumstances of the case, reasonably necessary and the charges made therefor were reasonable in amount. The defendant Town was justified in placing cement collars upon some joints and doing other supplemental work in areas where excessive leakage had been shown to insure tightness within allowable infiltration limits even though at the particular joint or connection, no observable defect was apparent. The defendant is not entitled to recover on its cross-complaint for repairs of damage done by Clark and Fray in the course of their corrective work; nor for defects in the line in certain areas where the original work was performed by another contractor, nor where damage

was done to the line by a third party, nor for defects which the defendant has not proven to be attributable to the fault of the plaintiff. The defendant has withdrawn any claim for interest on the judgment for the period prior to the judgment; for damages for delay; for extra time spent by the engineers on the corrective work; for legal services, and all cost of resurfacing the streets in the Contract VIII area.

[13235] There is no recovery by the plaintiff on its complaint and the defendant is entitled to recover on its cross-complaint against the plaintiff.

The cross-complaint by the Town against the plaintiff's bonding company, the United States Fidelity and Guaranty Co., was withdrawn on payment of $90,000 by the bonding company to the Town.

Dated at New Haven, Connecticut, this 24th day of March, A.D. 1958.

ROBERT P. ANDERSON
United States District Judge

LIBRARY

Office-Supreme Court, U.S.
FILED
MAR 7 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 707

E. Totonelly Sons, Inc., Petitioner

v.

Town of Fairfield, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

NORMAN K. PARSELLS,
MARSH, DAY & CALHOUN,
886 Main St.
Bridgeport, Conn.
Counsel for Respondent

Of Counsel:
JOHN J. DARCY,
945 Main St.
Bridgeport, Conn.

March 5, 1962

INDEX

PAGE

Questions Presented 1

Rule Involved 2

Statement 3

Argument 10

1. This Case Has Been Properly Decided In The Light Of Connecticut Law And There Are No Grounds For Granting Certiorari 10

A. Claim that the Court misconstrued its contract for a "determination" by the Engineer 10

B. Claim that the Court held contractor entitled to part of a class of performance contract 12

C. Claim that the Court invaded the province by placing a likelihood in the record 14

D. Claim that the Court arrogated [illegible] the contract 14

E. Claim that [illegible] the contract made the existence of [illegible] 15

2. The decision [illegible] 15

Conclusion 21

CITATIONS

PAGE

CASES

Asland Lime Salt & Cement Co. v. Shores, 105 Wisc. 122, 81 NW. 136, 138 11

Bernards v. Johnson, 314 U.S. 39, 31, 86 L. ed. 11, 19 17

Bowman v. Loperena, 311 U.S. 262, 264, 85 L. ed. 177, 179 (1940) 18

City of St. Charles v. Stookey, 154 Mod. 772 11

Conboy v. First Nat'l Bank, 203 U.S. 141, 51 L. ed. 128 (1906) 16

Fowler v. Smith, 274 F. 21, 335 (CA10, Okla.) 17

Klein's Outlet, Inc., et al. v. Lyons, 181 F. 2d 713 (CA2) 17

Milford v. Conn. R. Comm. Supp. 403, 418 (1940) 11, 13

Morse v. U.S., 270 U.S. 151, 153-54, 70 L. ed. 518, 520 (1926) 16

Nealon v. Hill, 149 F. 2d 883 (CA9th, Ariz. 1945) 17

Prisco v. Northern Ill. Finan. Corp., 317 U.S. 144, 87 L. ed. 146 (1942) 17, 18, 20

Rhoads v. Citizen's Nat'l Bank, 261 F. 2d 929 (CA 5th, Fla.) 18

Robinson v. U.S., 261 U.S. 400 (1923) 13

Safeway Stores v. Coe, 78 App. DC. 39, 136 F. 2d 771 (1943) 17

Wheeling Gas Co. v. Owens-Ill. Glass Co., 301 U.S. 131, 137, 81 L. ed. 557, 561 (1937) 16

MISCELLANEOUS

Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States" (1951 ed.) Sec. 409, pp. 821-22 15

Annot., "Appeal-Time-Motion for Rehearing" 10 A.L.R. 2d 1075 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 707

E. Totonelly Sons, Inc., Petitioner,
v.
Town of Fairfield, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Court of Appeals in this case decided an important state question in a way in conflict with applicable state law or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. When does the ninety day period for filing a petition for certiorari to the United States Court of Appeals begin to run where:

(A) After the time for filing a petition for rehearing has expired, under local court rules, and more than ninety days after the entry of that court's judgment, a motion for leave to file a petition for rehearing is filed with a copy of the proposed petition attached,

(B) In accordance with local rule, the motion for leave is assigned to the three judges who originally heard the appeal, and they deny the motion,

(C) The petition for rehearing is itself considered only to the extent necessary for the Chief Judge to deny the petition in accordance with local rule on the ground that no active circuit judge had requested a rehearing in banc.

RULE INVOLVED

[In addition to Rule 19 of this Court's Revised Rules printed in the petition for certiorari]

Rule 25, as amended April 25, 1960, of the Rules of the United States Court of Appeals for the Second Circuit:

Petitions for Rehearing

(a) Time; Form. Any petition for rehearing shall be filed with the clerk of the court within 15 days from the filing of the opinion in the clerk's office. Unless otherwise ordered, the petition must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that it is presented in good faith and not for delay. Twenty-four copies of the petition shall be filed. An answer to a petition for

rehearing will not be received except by order of the court.

(b) Disposition. Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or sua sponte, shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argument and upon the papers then before the court, unless otherwise ordered.

(c) Effect on Issuance of Mandate. If a petition for rehearing be filed within the time herein limited, no mandate shall issue pending the disposition of said petition, except by special order of the court.

(d) Petitions filed for purposes of delay. If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $100 against petitioner in favor of his adversary, to be collected with the costs in the case.

STATEMENT

(Unless otherwise indicated, all citations to the record refer to the indicated page or pages in the appendices originally filed by the respective parties in the Court of Appeals for the Second Circuit.)

In November, 1950, the Town of Fairfield advertised for bids on a group of eight sewer contracts for trunk and branch lines, including "Contract VIII" on which the petitioner from Newburgh, New York was the low bidder. Contract VIII was executed on February 19, 1951; and work started May 1, 1951.

Even a casual observer would have known this sewer would have to be constructed and operated under wet ground conditions (R. 1250a-54a, 1550a-51a). Neither Frank Totonelly himself, the petitioner's vice president and principal executive officer, or his superintendent on the job, Robert Quackenbush, or even his special trouble shooter, Charles Blair, had worked under comparably wet conditions or under specifications which put any limit whatsoever on the allowable infiltration of ground water into the lines (R. 1197a-98a, 1208a, 1275a). It was twenty-six year old Quackenbush's first job as superintendent (R. 1208a).

At least one of the Totonelly lines, Penfield Road at test point 8, leaked heavily and continually from the time it was laid in the summer of 1951 (R. 1206a, 1364a). The remainder leaked moderately from the beginning (Exhibit JJJ, R. 1742a). In the summer and fall of 1951 the contractor found and repaired some of these leaks. By the winter of 1951-1952, when construction pumping operations had stopped and the dry spell was ended, several of the lines leaked heavily (R. 115a, 1364a, 1370a). The first complete test of all the Contract VIII lines in June, 1952 revealed overall infiltration at a rate of more than 42,000 gallons per mile per day, as compared with the rate of approximately 5,000 gal-

lons per mile per day allowed by the specifications, for the pipe size used in Contract VIII (R. 996a, 998a, 1012a).

This infiltration would and did interfere with the proper use and operation of the sewer system. It meant there was less room in the Contract VIII lines available to carry live sewage. As a result, the line's live sewage capacity and its ability to meet the increased future demand resulting from continuing population growth were reduced. It meant increased operating cost and reduced capacity at the sewage treatment plant since all of the infiltrating ground water had to be pumped through the plant along with any live sewage. (See generally, R. 1320a, 1344a-46a).

Totonelly's superintendent, Robert Quackenbush, admitted that in the fall of 1951 the contractor had promised to return in the early spring to correct the infiltration (R. 1206a). But the contract completion date of January 15, 1952 (Exhibit 28, R. 1746a), came and went. It was not until March 31, 1952 after repeated requests by the Town, that any Totonelly representatives returned to Fairfield (R. 1370a-71a). Neither of the petitioner's original foremen ever returned to work in Fairfield (R. 1237a, 1261a). A few isolated repairs were made by a token force never exceeding four men; and towards the end of April, Quackenbush said his instructions were to stop all repair work other than lawn restoration in the vicinity of the installation (R. 969a). On April 21 the consulting engineers (Bowe, Albertson & Associates) advised the town to withhold future progress payments until the "work is brought to an acceptable status" (Exhibit DDD-2, R. 1728a), and

no further payments were ever made. In May, Philip Totonelly, president of the petitioner, told Kenneth D. Allen, Bowe Albertson's resident engineer, that his corporation "might just as well go broke the easy way", i.e., quit, go into bankruptcy, and let the bonding company take over and complete the contract (R. 1374a).

During the same period the petitioner had been building an apartment house project in Newburgh (R. 1199a, 1261a). This project and the petitioner were in serious financial difficulty by April 30, 1952 (R. 1200a, Exhibit 30, R. 1746a).

At a Fairfield Sewer Commission meeting on May 16, 1952, Frank Totonelly stated that his company did not intend to return to the job in order to make major repairs. The commission interpreted this as an abandonment of the contract and directed the engineers to send the petitioner a Notice of Warning under Sec. G 37 of the contract for failure to complete the work. It was sent on May 19 (R. 1728a-30a, Exhibit 23). In subsequent correspondence, the petitioner claimed it had not abandoned the contract, but there was no work in June or July. It was at this point, early in June, that the bonding company asked that the question of abandonment be held in abeyance pending the outcome of comprehensive weir tests (R. 1733a). It was these tests which showed excessive infiltration in 67 percent of the petitioner's sewer lines, and the engineers reported that the trouble was "defective workmanship without the customary follow-through by the contractor to correct his deficiencies" (R. 1733a-34a). On June 24 the commission was informed that the petitioner was represented by counsel (R. 1732a).

On July 28 the petitioner brought suit against the Town.

There were some further discussions and some self-serving letters from petitioner's counsel. Without prejudice to either party, the petitioner then stated it would "resume work" (Exhibit VV, R. 894a; see also Exhibits UU and WW, R. 892a-97a). At the end of August, the petitioner dug up a section on Penfield Road ostensibly to make repairs but actually in the hopes of establishing that the engineer had failed to specify a proper foundation for the soil conditions existing at that location and that as a result the sewer had settled out of proper line and grade (R. 1375a-76a). Instead it was established that 54 out of about 74 pipe joints examined were defectively made and leaking badly (R. 1380a). Mr. Allen, the resident engineer, testified that the joint compound had separated from the pipe because the pipe was wet or damp at the time of pouring and that larger holes or "voids" in the compound resulted from pouring it when it was too cold (R. 1380a-81a). Similar views were expressed by the compound manufacturer and a tile pipe representative at the time of the original exposure in August 1952 (Exhibit 92a, R. 1750a). Mr. Root, one of the petitioner's own experts, said the joints he saw showed bad workmanship (R. 1229a). Mr. Allen told the town (R. 1739a) and the petitioner's superintendent (R. 1385a) that the workmanship was defective. The petitioner had seen and heard enough. It repaired the exposed joints by adding cement collars (R. 1387a), buried the pipe (R. 1386a), made a half hearted attempt to get an extra work order for any further repairs (R. 898a-901a, 1739a-40a),

did a little cleaning up work and left town for good (R. 1386a). That was the end. A second Notice of Warning was sent on September 3, and at its September 10 meeting the commission voted to terminate the Totonelly contract (R. 1740a-41a).

Thereafter the Clark and Fray Construction Company which had successfully completed one of the companion sewer projects to Contract VIII, was engaged by the town to complete the repair work on Contract VIII. In the course of this repair work, the Totonelly lines were carefully exhumed (R. 1398a-99a, 1423a-24a) and endless examples of bad workmanship were found. Much trial time was devoted to a joint by joint description and explanation of the defects uncovered. From the nature of many of the defects it was self-evident that they had been created at the time of original installation by the petitioner (See e.g. R. 1395a, 1440a, 1439a, 1462a-7 & 8, 1419a, 1462a-37 to 39, 1568a, 1455a-57a, 1574a, 1567a-68a, 1581a-85a, 1600a, 1613a). The origin of the remaining defects was made equally clear by expert testimony (see generally the testimony of Kenneth D. Allen, William C. Fray, Louis J. Bacco, R. 1360a-1637a).

This suit was brought by the petitioner in the United States District Court for the District of Connecticut, on grounds of diversity of citizenship, to recover unpaid contract balances, claims for additional work, and damages for breach of contract. The Town filed a counterclaim for damages resulting from allegedly defective work by petitioner.

The trial before the district court, sitting without a jury, extended over 83 trial days. After entering

66 detailed findings of fact (R. 1126a-1173a), the district court concluded that the petitioner had not fulfilled its obligations under the contract and that its faulty workmanship had caused excessive infiltration of water beyond the allowable limits specified in the contract. The court accordingly dismissed petitioner's complaint and awarded $157,651.86 damages to the Town on its counterclaim.

The petitioner then appealed unsuccessfully to the United States Court of Appeals for the Second Circuit. From then on, the chronology of events was as follows:

June 30, 1961 — Court of appeals judgment entered.

July 19, 1961 — Order entered on stipulation extending deadline for requesting rehearing from July 15, 1961 to August 15, 1961 but specifically retaining June 30, 1961 as the starting point for the ninety-day period.

October 16, 1961 — Motion for leave to file petition for rehearing filed with copy of proposed petition attached (no copies served on respondent).

October 23, 1961 — Leave to file petition denied.

October 25, 1961 — Costs taxed against appellant and mandate to district court issued.

October 30, 1961 — Original record returned to district court.

November 9, 1961 — Petition itself denied because no active circuit judge had requested

that the case be reheard in banc as required by the local circuit court rules.

February 6, 1962 — Petition for certiorari filed.

ARGUMENT

1. This Case Has Been Properly Decided In The Light Of Connecticut Law And There Are No Grounds For Granting Certiorari.

Petitioner is seeking certiorari on the ground that, within the contemplation of Rule 19(b) of this Court, there has been a gross disregard of the applicable State law. Petitioner has included in its "Statement", pp. 3-11 of its petition, the particular points of Connecticut law which it claims the court of appeals and district court failed to apply to this case. A brief examination will show that each one of these alleged points of law is actually a disputed question of fact and nothing more. The petitioner is really asking this Court to retry the facts and this, of course, would not be proper.

The five so-called points of law are considered below in the order raised by the petitioner.

A. Claim that the Court substituted its opinion for a "determination" by the Engineers.

This claim sets up a straw man. It assumes that in 1951 there was a "determination" made by the engineers and binding on all parties that the petition-

er's workmanship was not defective. As a matter of fact, there never was any such "determination".

The petitioner apparently claims that the engineers' monthly payment certificates constituted a final and binding decision that all work covered therein had been performed with good workmanship in accordance with the contract. These certificates are the "approximate certificates" provided for in sec. G 31 of the contract (R. 826a). An examination of that section makes clear that the primary purpose of these certificates is to establish the **quantity** and not the **quality** of work done and materials used. Here the engineers are exercising a comptroller function and not the arbitrator function involved in many of the cases cited by the petitioner. If the approval of payments by issuance of monthly certificates constituted an acceptance of the work covered thereby, there would be no sense in contract sec. G 35 (b) permitting the withholding of "approved payments" where there is defective work. Indeed, even after final payment under sec. G 32 and G 33, the town could have required the petitioner to do "repairing, replacing, or rebuilding" under G 34 (R. 827a-828a). *See* **Milford v. O'Neil**, 8 Conn. Supp. 403, 418, (1940, unreported in Atlantic Reporter).

Compare **City of St. Charles v. Stookey**, 134 Fed. 772, 779 which involved not a sec. G 31 type approximate certificate, but a sec. G 32 type final certificate required to be made "when the contract is completed and tested to the satisfaction of the engineer and all repairs made"; and **Ashland Lime Salt and Cement Co. v. Shores**, 103 Wisc. 122, 81 NW 136, 138, wherein the contract specifically provided that monthly certificates would be issued only

for work which had been performed "in accordance with the contract" and "to the architect's satisfaction" and the court was obviously distinguishing those certificates from the G 31 type when it said that they "were not mere approximate estimates of the value of labor and materials brought into the building during the previous months, which under many authorities are subject to subsequent revision."

As the court below pointed out, the claim that there was binding approval of the petitioner's workmanship by the engineers during the progress of the job is further demolished by sec. G15 of the contract (R. 816a) which states:

> "Failure on the part of the Engineer or any of his authorized agents to detect inferior work or materials and condemn the same, shall not be construed to imply an acceptance of such work or materials; nor shall it be construed as barring the Municipality, at any subsequent time, from the recovery of such sum of money from the Contractor as may be needed to construct or build anew all portions of the work in which fraud was practiced, improper work executed, or improper material furnished and built into the work."

B. Claim that the Court held excessive infiltration per se was a breach of petitioner's contract.

This is another straw man. As the following excerpt (R. 1177a) from his opinion shows, the trial judge made no such decision (although respondent

believes he would have been fully justified in so doing):

> "The issue of the case is resolved by the finding of poor workmanship which was the cause of the failure of the sewer lines adequately to fulfill the purpose for which they were built **without particular regard to the limitation on the infiltration rate provided in the contract. Robinson v. U. S.**, 261 U. S. 490 (1923). The plaintiff relies heavily upon a Connecticut case, decided by the Superior Court, **Milford v. O'Neil Bros., Inc.**, 8 Conn. Supp. 403; That case is distinguishable from the present case in many respects. It is sufficient, however, to point out that in the **O'Neil** case there was no evidence of defective workmanship or of the use of defective materials by the contractor." (Emphasis added)

Here again, there is no real question of law, Connecticut or otherwise, involved. It is painfully clear that the petitioner is really attempting to attack the trial court's factual finding of massive bad workmanship. As Judge Hincks said in the appeal below (Petition, p. 8a):

> "In short, it is the law of Connecticut that the plaintiff here must fail if it is established that the excessive infiltration was caused by his defective workmanship. And here, the record is replete with evidence of faulty workmanship from which the inference of the causal relationship was fully justified."

C. Claim that the Town breached the contract by placing a bulkhead in the sewer line.

Here again there is nothing particularly wrong with the law cited by the petitioner, but it has no application to the facts of this case. Under the contract, the town had a perfect right to install the bulkhead to hold back the petitioner's excess water since, contrary to secs. G 5 and D 8 of the contract (R. 810a and 847a), the petitioner was draining it into the pipes of the adjacent contractors who were building the trunk sewer and the treatment plant. Furthermore, there was no evidence that the bulkhead had actually caused any damage to the petitioner's sewer pipes or interfered in any way with its completion of the contract, and this fact is reflected in the trial judge's findings Nos. 25, 26, and 27 (R. 1133a-1134a).

D. Claim that the Town wrongfully terminated the contract.

This claim also only involves questions of fact. The petitioner claims that the town repudiated the contract some time in the summer and fall of 1952. The trial court found that in effect the petitioner, not the town had earlier abandoned the work and "repudiated its duties under the contract" on May 27, 1952, and it further found the facts surrounding the Aug. 1952 opening of the Penfield Road sewer quite differently from petitioner's version (findings Nos. 36-49, R. 1136a-1139a). For example, page 9 of the petition claims that when the Penfield Road sewer was exposed, "no defects in workmanship were found," whereas the trial court found that there were

separations and openings in the pipe joints which were repaired by adding cement collars (Finding No. 45, R. 1138a).

E. Claim that Town's improper termination of the contract made the evidence of subsequently discovered bad workmanship inadmissible.

To state this claim is to demonstrate its frivolity. Not only is it a questionable and incomplete statement of the law, but it assumes that the town improperly terminated the contract whereas the trial court found otherwise.

2. The Petition for Certiorari must fail because it was not filed within the required 90 days.

It is clear that the ninety day time limit for filing a petition for certiorari contained in 28 USC Section 2101(c) is jurisdictional and this court has no power to entertain a petition filed after the expiration of the ninety day period. Robertson & Kirkham, **Jurisdiction of the Supreme Court of the United States** (1951 ed.) Section 409, pp. 821-22.

Whether the petitioner here has met the ninety day requirement depends on whether its attempt to obtain a rehearing by the Circuit Court of Appeals tolled the running of the ninety day period and started it anew. As conceded in the middle paragraph of page 12 of E. Totonelly Sons, Inc.'s petition, the ninety day period clearly had not been tolled by anything occurring through October 23, 1961. By

then the fifteen day time for filing a petition for rehearing under Rule 25 of the Court of Appeals for the Second Circuit (as extended by stipulation to August 15, 1961) had expired, and the time for appeal to this Court (i.e., the time for seeking certiorari) had also expired.

In these circumstances under the older cases, this Court clearly would have no jurisdiction to entertain this petition for certiorari. See **e.g., Conboy v. First National Bank**, 203 U. S. 141, 51 L. ed. 128 (1906); **Morse v. U. S.**, 270 U. S. 151, 153-54, 70 L. ed. 518, 520 (1926).

Some of the unanswered questions in this area of appellate jurisdiction were later covered in **Wayne United Gas Co. v. Owens-Ill. Glass Co.**, 300 U. S. 131, 137, 81 L. ed. 557, 561 (1937) which recognized the power of a bankruptcy court to "entertain" an untimely petition for rehearing and to thereby extend the time for taking an appeal. However, in the **Wayne** case there could be no question about whether the petition was "entertained" because it was granted and there actually was a rehearing, and the court made it very clear that:

> " . . . the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed."

In still more recent years, there has been a tendency to confine what might be called the more liberal "entertainment"-of-motion test of the **Wayne** case to bankruptcy cases. See anno, "Appeal-Time-

Motion for Rehearing", 10 ALR 2d 1075, 1077; **Safeway Stores v. Coe,** 78 App. D.C. 19, 136 F 2d 771 (1943); and **Nealon v. Hill,** 149 F. 2d 883 (CA 9th, Ariz. 1945), cert. den. 326 U. S. 753, 90 L. ed. 451. Even in bankruptcy cases it is sometimes ignored, **e.g., Fowler v. Smiser,** 274 F.2d 335, (CAIO, Okla.) cert. den. 362 U. S. 988, 4 L. ed. 2d 1022, and other times the test is applied but applied strictly enough so that no extension of time results, **e.g., Pfister v. Northern Ill. Finan. Corp.,** 317 U. S. 144, 87 L. ed. 146 (1942); **Bernards v. Johnson,** 314 U. S. 19, 31, 86 L. ed. 11, 19; **Klein's Outlet, Inc. et al v. Lipton,** 181 F. 2d 713 (CA 2); cert. den. 340 U. S. 883, 95 L. ed. 612.

Furthermore, even if the "entertainment" test applies equally to non-bankruptcy situations, it is clear that the Court of Appeals for the Second Circuit never "entertained" E. Totonelly Sons, Inc.'s petition for rehearing.

As was said in the **Klein's** case supra, 181 F. 2d at 714,

> "Entertainment of the motion apparently means that the court considers on the merits the ground for rehearing asserted in the motion."

The **Klein's** case involved what had been treated by the District Judge as a motion to reargue. It had been filed within the applicable time limit but it was under consideration for about one month and was not decided until after the time had expired. In a memorandum decision denying the motion, District Judge Holtzoff stated:

> "No reason appears for further consideration of this matter by this Court. The order heretofore made will stand."

After quoting the above decision, Judges L. Hand, Swan and Chase held per curiam:

> "It is clear from Judge Holtzoff's memorandum opinion that he did not 'entertain' the motion."

In the present case, the petitioner puts great stress on the fact that the formal judgment file signed and presumably prepared by the clerk recites that the November 9, 1961 denial of the petition for rehearing was "upon consideration thereof."

In cases where the petition was held to have been "entertained", something more than mere "consideration" is involved. For example, in **Ribaudo v. Citizen's National Bank,** 261 F. 2d 929 (CA 5th, Fla.), the court noted that the judge below had **"heard** the petition for rehearing and considered it after being **fully advised"** (emphasis added); and in **Bowman v. Loperena,** 311 U. S. 262, 264, 85 L. ed. 177, 179 (1940), cited by the present petitioner, the judge below had endorsed on the petition for rehearing that it had "been 'seasonably presented' and entertained' by the above entitled court" and thereafter there was a hearing and a written opinion.

It would be a travesty, if mere "consideration" of an untimely petition amounted to its being "entertained". This court used the following language to make this very point clear in **Pfister v. Northern Ill.**

Fin. Corp., supra, 317 U. S. at 150-151, 87 L. ed. 151-152:

> "On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts — if any are offered — support grounds for opening the original order and determines that no grounds for a re-examination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.
>
> "If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out-of-time petition would be enough. Of course, the court must examine the petition to see whether it should be granted. Indeed the examination given a motion to file such a petition might just as well be said to justify the advancement of the time for review. It is quite true that in a petition for review upon the ground of error in law in the original order, the examination of the grounds of the petition for rehearing is equivalent to a re-examination of the basis of the original decree. But in such a case the order on the petition for review would control. It would show either a refusal to allow

the petition for rehearing or a refusal to modify the original order. Cf. Wayne United Gas Co. v. Owens-Illinois Glass Co. 300 US 131, 137, 138, 81 L ed 557, 561, 562, 57 S Ct 382, 33 Am Bankr Rep (NS) 1. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

"In the present case it is quite plain the denial was grounded upon a failure of the petitions for rehearing to establish adequate grounds for the re-examination of the original orders."

In the present case, as in **Pfister,** it is clear the petition was "considered" but not "entertained". To fully understand the situation it is necessary to refer to the excerpt from the rules of the Court of Appeals for the Second Circuit which is printed on p. 2 of this brief. Chief Judge J. Edward Lumbard's memorandum of decision dated November 9, 1961 and the formal order entered pursuant thereto by the Clerk (reproduced respectively on pp. 3a and 4a of the present petition) gives no indication that the petition for rehearing was entertained on the merits. It specifically gives as the reason for the denial the fact that no active circuit judge requested a rehearing. Under Rule 25 above, it would only be after such a request that the Chief Judge would "cause that issue [i.e. the issue of whether there should be a rehearing] to be determined by the active judges". Such a "determination" would probably amount to "entertaining" an untimely petition for rehearing, but the proceedings in this case never went that far because not even one of the active judges was "of the opinion that the case should be reheard in banc".

It is certainly significant that on October 25, 1961, two days after denial of the motion for leave to file a petition for rehearing, the mandate to the district court was issued and costs were taxed against the appellant. It is also significant that the original record was returned to the district court on October 30, 1961 so it was not even available to the court of appeals on November 9, 1961 when the final coffin nail was driven into the petition for rehearing. Obviously on November 9 the court was not "entertaining" the petition, it was simply completing the official record so it would be clear no potential escape hatches still remained open under local Rule 25.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

Norman A. Pattis,
Mahoney & Cargill,
850 Main Street,
Bridgeport, Connecticut

Attorneys for Petitioner

Of Counsel
John J. Darcy,
945 Main Street,
Bridgeport, Connecticut

On the Brief
David S. MacLay

March 5, 1962